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In the Supreme Court of the United States

OCTOBER TERM, 1985

BENJAMIN RAPHAN AND MYRNA RAPHAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In this federal income tax case, petitioners seek review of an evidentiary ruling that did not affect the outcome of this case and in any event is not worthy of further review.[1]

This suit arises out of the Commissioner's disallowance of losses claimed by a limited partnership in 1970 and 1971, allegedly resulting from the construction by the partnership of an apartment building known as the James Buchanan project (Pet. App. 1a; C.A. App. 11-24). Petitioner Benjamin Raphan, through a series of intermediate partnerships, claimed $2,924 of the losses in 1970 and $5,330 in 1971 (C.A. App. 14). Petitioners paid the additional taxes

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[1]The court of appeals' opinion is reported at 759 F.2d 879. The Claims Court's opinion, which is not reproduced in the appendix to the petition, is reported at 3 Cl. Ct. 457.

resulting from the disallowances and sued for a refund in the Claims Court (C.A. App. 10-15).

After bringing suit, petitioners served interrogatories on the United States, requesting that it identify, by complete description of title and contents, every document in its possession having any relation to the James Buchanan project or, in lieu of describing the documents, produce a copy of each such document (C.A. App. 48). The individual general partners in the partnership were members of the Pomponio family, who had been the subject of a grand jury investigation relating to their numerous business ventures, including the Buchanan project. This investigation culminated in several indictments and convictions. C.A. App. 48-50, 214. See, *e.g.*, *United States* v. *Pomponio*, 429 U.S. 10 (1976). In response to the interrogatories, the United States acknowledged that such documents existed but sought a protective order against their discovery, primarily on the ground that the documents had been obtained by grand jury subpoena and that, consequently, access to those documents was limited by Rule 6(e), Fed. R. Crim. P. Pursuant to Rule 6(e), a request for disclosure of grand jury documents must be directed to the appropriate district court (C.A. App. 48-50). Petitioners opposed the motion, arguing (1) that the documents were not covered by Rule 6(e) because they were sought "for their own intrinsic value, not to disclose what transpired before the grand jury"; and (2) that the grand jury had long since been terminated and, thus, the government's claim of grand jury secrecy was "untenable" and had a "total lack of merit" (C.A. App. 57-58).

The Claims Court denied the United States' motion for a protective order (C.A. App. 68).[2] The attorney for the United States then began a search through a vast quantity of

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[2]The Claims Court denied the United States' motion for a protective order "without prejudice * * * to renew[al of the] motion in the event plaintiff seeks to compel production of documents after defendant has

documents obtained by the grand jury. This search took one year and three months to complete and located more than 1,600 relevant documents, all of which were turned over to the taxpayers. C.A. App. 83. In 1981, after reviewing the documents, the United States decided that it would like to use as its own exhibits some 200 of those documents, consisting of various business records relating to the Buchanan project, and amended its pretrial order to that effect (C.A. App. 70, 86).

Petitioners opposed admission of the government's exhibits on the ground that "they were obtained in violation of Rule 6(e)" (C.A. App. 103; see also C.A. App. 112-117, 144-160). The United States argued, inter alia, that it had properly obtained the grand jury documents pursuant to an ex parte order dated May 5, 1972 (C.A. App. 180-181) of the United States District Court for the Eastern District of Virginia (C.A. App. 221-224).

At the Claims Court's suggestion, the United States sought clarification from the district court that issued the 1972 order as to the use of the grand jury materials at the trial in this case (Pet. App. 26a-27a; C.A. App. 391-409). The district court indicated that its 1972 order was clear and did not require clarification (Pet. App. 29a). Following the district court proceedings, the Claims Court concluded that the 1972 order was intended to permit the IRS both to use the evidence in conducting a civil tax investigation and to

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answered or objected to the subject interrogatories" (C.A. App. 68). If the documents were in fact grand jury materials subject to Rule 6(e), however, merely describing their contents, as the interrogatories required, would have violated Rule 6(e) (C.A. App. 50). Moreover, in order to answer the interrogatories, the government attorney would be required to search through a vast quantity of documents. After entry of the Claims Court's order, the United States concluded that the documents were not subject to Rule 6(e) and complied with petitioners' interrogatories and the court's order by producing all of the relevant documents.

release that evidence to the Department of Justice for introduction in court proceedings, such as this case (Pet. App. 21a-23a).

Following a four-day trial, the Claims Court rendered its opinion on September 26, 1983 (C.A. App. 663-674). The court rejected the government's arguments (1) that the losses in question were attributable to a corporation controlled by the Pomponios and not to the partnership, and (2) that even if the losses were attributable to the partnership, the petitioners lacked sufficient basis in their partnership interest to deduct the losses (*ibid.*).

On appeal, the United States Court of Appeals for the Federal Circuit agreed with the Claims Court that the losses were attributable to the partnership (Pet. App. 6a-8a), but reversed on the basic issue (Pet. App. 8a-14a). The court of appeals concluded that the Pomponios had guaranteed the construction loan in their capacity as partners and had thus become personally liable for that loan. Under 26 C.F.R. 1.752-1(e), it followed that only the general—but not the limited—partners could increase their partnership bases with respect to that loan. This left the petitioners with insufficient basis to deduct the losses.

Petitioners conceded that the 1972 disclosure order authorized the use of the grand jury documents in the Claims Court but argued that the order was erroneous and that the documents consequently should be suppressed. The court of appeals rejected this argument because (1) the petitioners' litigation conduct estopped them from making the argument, (2) petitioners lacked standing to dispute the order, and (3) their reliance on *United States* v. *Baggot*, 463 U.S. 476 (1983), was misplaced (Pet. App. 14a-15a).

1. Petitioners seek review only of the ruling on their evidentiary motion; they do not seek review of the appellate court's adverse holding on the merits. For several reasons, review by this Court is not warranted.

To begin with, the ruling on their evidentiary motion did not affect the outcome of the case. If their motion had been granted, the only relevant consequence would have been to exclude from evidence the general partners' guarantee of the construction loan. However, one of petitioners' own exhibits, the construction loan commitment, shows that the lender required the Pomponios' personal guarantees as a condition for obtaining the construction loan (C.A. App. 1496). Thus, even if petitioners' motion had been granted, the evidence still would have established that the loan was guaranteed, and the court's ruling that petitioners consequently had insufficient basis to deduct the losses thus would not have been affected.

Moreover, as the court of appeals recognized (Pet. App. 15a), petitioners are "ill-positioned to oppose admission of the exhibits" since they (1) engineered the very disclosure of which they now complain; (2) successfully opposed the government's motion on the very ground that the documents were *not* subject to Rule 6(e); (3) caused the government to expend a massive amount of attorney time searching a vast quantity of documents; and (4) obtained the benefits of their discovery request by receiving more than 1,600 documents. The denial of petitioners' motion for suppression was supported by the rule that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."[3] *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895).

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[3]Petitioners incorrectly assert (Pet. 10 n.*) that estoppel cannot be applied against them because the 1972 order was "invalid as a matter of law." Equitable estoppel presumes that a party's litigating conduct may bar that party from raising an otherwise meritorious argument. Nor does estoppel apply here against the United States, as petitioners suggest (Pet. 10 n.*). After the United States' motion for a protective order

2. In any event, petitioners lack standing to challenge the 1972 disclosure order, as the court below held (Pet. App. 15a). They were not targets of the grand jury investigation, nor did they even appear as witnesses. Moreover, the only document now relevant, the loan guarantee, is a pre-existing business record that does not even refer to the petitioners.[4] Thus, the facts do not support their suggestion (Pet. 6-7) that they are "innocent person[s] * * * involved in a grand jury investigation" and that they are seeking to keep secret the fact of their investigation.[5] Petitioners' reliance (Pet. 5-6) on *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), where targets of the grand jury investigation opposed release of transcripts of their own grand jury testimony, thus plainly is misplaced.

Moreover, even if petitioners had standing to challenge the 1972 disclosure order, they raised their objections in the wrong forum. The 1972 order was an order by the court having supervisory control over the grand jury, and that order was effective until reversed or modified. Petitioners should have sought any desired modification of the disclosure order in that court.[6] See *In re Grand Jury Proceedings,*

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was denied, it complied with petitioners' interrogatories, and it abandoned its argument that the documents were barred from disclosure under Rule 6(e). The United States thus has not "contended from the beginning that disclosure was improper" (Pet. 10 n.*).

[4]Indeed, with the exception of three exhibits that simply list Mr. Raphan as one of twenty members of a law firm none of the other exhibits contains a direct reference to Mr. Raphan (C.A. App. 226 & n.4).

[5]The fact that the grand jury subpoenaed material relating to the Pomponios' activity in the Buchanan project (among many other deals) appears in publicly filed documents in the criminal cases against the Pomponios and thus is a matter of public record (C.A. App. 214, 462, 465, 468, 473-475, 493, 496, 499).

[6]Petitioners sought to intervene in the proceeding in the Eastern District of Virginia regarding the 1972 disclosure order and argued that the 1972 order did not cover the documents in question (C.A. App.

Miller Brewing Co., 687 F.2d 1079, 1095-1096 (7th Cir. 1982); *In re Proceedings Before the Federal Grand Jury*, 643 F.2d 641 (9th Cir. 1981).

3. Even if we assume that petitioners could challenge the 1972 disclosure order in the Claims Court, that order, insofar as it affects this case, is not erroneous.[7] The order authorized disclosure of grand jury matters to the government for use both in civil tax investigations and in civil tax cases, such as the instant case. *United States* v. *Baggot, supra*, on which petitioners rely (Pet. 8-9), holds that Rule 6(e) does not authorize disclosure to the IRS for investigatory purposes prior to any actual judicial proceeding. Here, however, the disclosure of which petitioners complain was made directly to a Justice Department attorney during, and for use in, the instant judicial proceeding, and thus was valid under *Baggot*.[8]

Finally, even if the 1972 order were inconsistent with *Baggot*, suppression is not an appropriate remedy. Pursuant to a facially-valid disclosure order, grand jury documents were disclosed to both a Justice Department attorney

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404-409). The motion to intervene was not acted upon, and petitioners did not seek any further relief in that court.

[7]It is highly questionable whether Rule 6(e) has any application here, since the documents in question were pre-existing documents sought for their intrinsic value and not to reveal the workings of the grand jury. See, *e.g.*, *In re Special February 1975 Grand Jury*, 662 F.2d 1232, 1244 (7th Cir. 1981), aff'd on the other grounds *sub nom. United States* v. *Baggot*, 463 U.S. 476 (1983). The Claims Court thus appears to have erred in concluding here that the documents were subject to Rule 6(e) (C.A. App. 358).

[8]Below, petitioners also argued that the United States had not established "particularized need" for disclosure of the grand jury documents (see Pet. 4). Petitioners do not advance that argument in their petition. Indeed, they in effect conceded the existence of particularized need by asserting below (Appellee's Br. 45) that without the exhibits "the government would have no case at all."

and petitioners in 1980 and were admitted as evidence in the trial below held in early May 1983. After the four-day trial was completed and oral findings were made (C.A. App. 1366-1419), this Court issued its opinion in *Baggot*. That holding should not, under the circumstances of this case, be applied so as to invalidate retroactively the use of the guarantee as evidence. The United States relied on the 1972 disclosure order by not seeking to obtain the guarantee through discovery.[9] It thus would seriously prejudice the government's interests to invalidate retroactively the use of that exhibit. Moreover, that document is referred to in the courts' opinions and is now a matter of public knowledge. No purpose would be served by retroactively invalidating the use of that exhibit.[10] Indeed, since suppression here could plainly have no deterrent effect, it should not be available as a remedy. *United States* v. *Leon*, No. 82-1771 (July 5, 1984); *Gluck* v. *United States*, No. 84-5282 (3d Cir. Aug. 28, 1985); *Graham* v. *Commissioner*, No. 84-5366 (3d Cir. Aug. 28, 1985).[11]

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[9]Since petitioners' own exhibits, produced in 1979, referred to the guarantee, the government had an independent source of knowledge of the existence of the guarantee.

[10]Cf. *Alexander* v. *Commissioner*, 476 F.2d 974 (5th Cir. 1973) and *Romanelli* v. *Commissioner*, 466 F.2d 872, 875-877 & n.3 (7th Cir. 1972) (refusing to suppress evidence obtained under valid search warrants, where later Supreme Court cases removed the legal basis for those warrants.)

[11]Petitioners' reliance (Pet. 8-10) on *In re Sells*, 719 F.2d 985 (9th Cir. 1983), is entirely misplaced, and there is no conflict with that decision. That case was an appeal from a district court order disclosing grand jury materials, and the Ninth Circuit applied *Baggot* on the ground that "an appellate court should apply the law as it stands on the date of the appellate decision" (*id.* at 990). Here, an entirely different question is presented, viz., whether documents released pursuant to a long-standing Rule 6(e) order and introduced into evidence in a civil trial should retroactively be suppressed where, in light of a subsequent opinion, the disclosure order is determined to have been erroneously granted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General

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